UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE DETROIT NEWS, INC., LIMITED PARTNER AND ITS AGENT DETROIT NEWSPAPER PARTNERSHIP, L.P., A LIMITED PARTNERSHIP, A/K/A DETROIT MEDIA PARTNERSHIP	)	
Respondents,	)	**CASE NOS.**
	)	**07-CA-132726**
	)	**07-CA-132729**
AND	)	
THE DETROIT FREE PRESS, INC., GENERAL PARTNER AND ITS AGENT DETROIT NEWSPAPER PARTNERSHIP, L.P. A LIMITED PARTNERSHIP A/K/A DETROIT MEDIA PARTNERSHIP	)	
Respondents,	)	
V.	)	
NEWSPAPER GUILD OF DETROIT, LOCAL 34022 OF THE NEWSPAPER GUILD/CWA AFL-CIO	)	
Charging Union.	)	

ANSWERING BRIEF OF *DETROIT FREE PRESS* AND DETROIT MEDIA PARTNERSHIP TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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STATEMENT OF THE CASE

On August 12, 2015, Administrative Law Judge Susan A. Flynn issued her Decision in the instant cases**.** On October 13, 2015, *Free Press* filed Exceptions and a Brief in Support Thereof. On October 27, 2015, the Counsel for the General Counsel ("General Counsel") filed an Answering Brief. On October 27, 2015, the General Counsel filed Cross-Exceptions and a Brief in Support Thereof. On November 10, 2015, *Free* Press filed its Reply Brief in Support of Exceptions. Upon an uncontested motion to Executive Secretary granted an extension of time to November 24, 2015 to filed an Answering Brief. Pursuant to Section 102.46(f)(1) of the NLRB's Rules and Regulations, Series 8, as amended, *Free Press* files this Answering Brief.[1]

INTRODUCTION

The General Counsel's eight Cross-Exceptions involve three issues:

1) Decisional versus effects bargaining and *Free Press*' move to a new facility, considered in light of the Guild's bargaining demands (Exceptions 1-4, 7-8);
2) Whether Mark Brown's June 16, 2014 E-Mail constituted "direct dealing," (Exception 5); and
3) Whether a make-whole remedy should be directed in addition to the *Transmarine* remedy advanced by the ALJ? (Exception 6).

These Cross-Exceptions will be addressed in turn.

[1] This Answering Brief is filed on behalf of Detroit Media Partnership and *Free Press*. DMP is a stipulated agent of *Free Press* and *News*, only for purposes of parking. For ease of reading, references in this Answering Brief to *Free Press* will include DMP as agent of *Free Press* for parking only, unless specifically distinguished.

ARGUMENT

I. THE ALJ PROPERLY DETERMINED THAT ANY CHANGE TO THE PARKING POLICY WAS AN EFFECT OF DETROIT MEDIA PARTNERSHIP'S DECISION TO SELL THE *DETROIT NEWS* BUILDING AND PARKING LOTS AND RELOCATE TO 160 FORT STREET.

The General Counsel asserts the ALJ erred by failing to address a purported allegation that *Free Press* had an obligation to bargain over the "decision to change the parking conditions of employees." (Br. at 2, 8-13). The General Counsel's argument erroneously assumes that the allegation was plead in the Complaint, which it was not; ignores the admissions and record evidence that the Guild ***only*** demanded bargaining over the effects and not the decision, itself; and assumes that parking was a mandatory subject of bargaining, in the first place.

The General Counsel's Cross-Exceptions relating to the decision to offer to bargaining-unit employees – as well as all other represented and unrepresented employees – the options and opportunities to park after the move to the new facility disregards *Free Press*' unabridged right to relocate its facilities. The General Counsel fails to acknowledge or appreciate that the new parking opportunities for all employees was an effect of the exclusive management decision to relocate. Attempting to frame the issue as a decision about parking completely ignores why a new parking opportunities and options were offered to all employees, in the first place.

A. The General Counsel Did Not Specifically Plead that *Free Press* Violated the Act by Failing to Bargain About the Decision to Relocate to the 160 Fort Street Address and Sell the Parking Lots

The General Counsel failed to satisfy the standards necessary to properly plead the Complaint. *Bender v. Dudas*, 2006 WL 89831, at *22 (D.D.C. 2006), aff'd 490 F.3d 1361 (Fed. Cir. 2007) explained:

> An administrative complaint must, at a minimum, set forth the charged violations and the facts on which those violations are founded so that the Charged Party may adequately prepare and present a defense.

There was no specific allegation regarding decisional bargaining; neither the ALJ nor *Free Press* was ever on notice that decisional bargaining was an issue. The General Counsel relies upon vague language in the Complaints. Similarly, nowhere in the General Counsel's Opening Statement was the concept of decisional bargaining suggested; Counsel to the Guild did not claim that *Free Press* had an obligation to bargain over the decision in his opening statement, either. The decisional bargaining claim is a *post hoc* concoction of the General Counsel that appears to be rooted in bad faith. These Cross-Exceptions should be denied.[2]

The Board's Rules and Regulations mandate that a Complaint be specific, providing, in relevant part:

> [t]he Complaint shall contain: (a) A clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

[2] The General Counsel did not move to amend the Complaints after the close of the hearing. *Free Press* specifically objects to the General Counsel's Cross-Exceptions being viewed as an attempt to amend the Complaints; *Free Press* did not have an opportunity to present evidence in defense of decisional bargaining, at the hearing.

29 C.F.R. §102.15. The General Counsel did not "clearly and concisely" make the decision to relocate and/or decision to sell the parking lots an issue in the Complaints.

The General Counsel relies on Paragraphs 11 and 17 of the Complaints as an ostensible representation that the Complaints allege that *Free Press* and DMP had an obligation to bargain over the decision to sell the *Detroit News* building and parking lots and to move its business to a new location. (Br. at 8). An examination of the language in the Complaints undermines the General Counsel's assertion.

Paragraph 11 references an announcement of "(a) … new parking policies and procedures, including locations and costs …"; and "(b) … new parking policies and procedures described in Paragraph 11(a)." Paragraph 17 alleges "… Respondents engaged in the conduct described above in paragraph 11 without affording the [Guild] a meaningful opportunity to bargain with Respondents with respect to this conduct and the effects of this conduct …" (GC Ex. 1(o), 1(m)). If the General Counsel expected the ALJ to rule that *Free Press* and DMP had the obligation to bargain about its decision to sell the *Detroit News* building and the parking lots, the General Counsel had an obligation to, at a minimum, put the word "decision" in the Complaint. The concept of decisional bargaining versus effects bargaining is a well-established and understood distinction in the annals of labor law.

The General Counsel's representation that the words "with respect to this conduct" somehow makes it clear that the Complaints allege the allegation that *Free Press* and DMP had an obligation to bargain over the decision to sell the *Detroit News* building and the parking lots, much less DMP's decision to offer parking opportunities and options at the new facility, is extraordinary. The General Counsel controls the

Complaint, determines its text, and decides which allegations and theories to allege. Any attempts to clarify the Complaints' language is too late and constitutes an admission that the Complaints were not well plead.

The General Counsel has an obligation to "clearly and concisely" plead purported violations of the Act. In *NLRB v. Blake Const. Co.*, 663 F.2d 272, 280 (D.C. Cir. 1981), the General Counsel failed to include, in a Complaint, allegations against the company that were included in charges filed with the Region. The ALJ and Board found a violation of the Act based on these non-existent allegations. *Id*. The court, in overturning the Board, explained:

> Nevertheless, no matter how reprehensible the Company's conduct, it does not excuse the Board or its General Counsel from a duty to assure that a Charged Party is given adequate notice of all the alleged violations of the Act and that these violations are litigated before sanctions are imposed. Elemental procedural due process prevents this Court from granting enforcement of remedies that go beyond the scope of the Complaint and are directed toward violations of the Act not noticed or actually tried before the ALJ or the Board.

Blake Const. Co., 663 F.2d at 283. The court reviewed the transcript, as well, and recognized that at no point in the hearing did the General Counsel make "a clear statement … that the Company was on trial for [the un-specified allegation in the Complaint.]" *Id*. at 280.

Due process demands that the General Counsel clearly and concisely plead allegations in the Complaints. These Cross-Exceptions reek of the General Counsel waiting in the the proverbial weeds and unleashing a sneak attack, now that the hearing is closed. The General Counsel, in drafting the Complaints, made the decision to omit any clear description of the lack of decisional bargaining as an allegation. The lack of a descriptor pertaining to a decision, or decisional bargaining, fails to meet the

requirements that the General Counsel plead the allegations clearly and concisely. For example, in *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 973-974 (10th Cir. 1990), the Complaint failed to explicitly mention direct dealing as a charged offense, although the Complaint alleged facts consistent with direct dealing. The lack of a clear and concise allegation was fatal to the claim and the court dismissed the allegation out of due process concerns. *Id*.

In addition to the procedural deficiencies of the Complaints, the record is void of any litigation addressing the decision, as claimed by the General Counsel in the Cross-Exceptions. While the General Counsel asserts that the record supports the assertion that the Guild demanded to bargain over the decision to offer parking to bargaining-unit employees on the same terms and conditions as all other employees, an actual examination of the cited record does not support the General Counsel. (GC Br. at 6), *infra*.

The ALJ issued findings and conclusions of law based on the allegations contained in the Complaints. The ALJ Decision conformed with the allegations as described by the General Counsel. The General Counsel cannot, now, complain that the ALJ failed to make findings and conclusions of law based on facts and conclusions of law not contained in the Complaints. Again, it is the General Counsel's burden to properly plead the Complaints with a clear and concise statement of facts. It is inappropriate for the General Counsel to except to the ALJ failing to issue findings and conclusions of law the General Counsel did not specify. If the General Counsel intended to pursue a theory relating to decisional bargaining, then the General Counsel should

have put the words "decisional bargaining" or "bargain about the decision" in the Complaint.

B. The Guild Never Demanded to Bargain Over the Decision to Move to 160 Fort Street and Made It Clear that the Guild Only Demanded to Bargain Over the Effects of the Decision to Move to 160 Fort Street

The record does not support the General Counsel's attempt to characterize or categorize the Guild's demands as decisional bargaining. The General Counsel asserts that the Guild sought to bargain over the decision to move to 160 Fort Street and sell the *Detroit News* building, as well as the surrounding parking lots. (GC Br. at 5-6, 11-13). In support of this notion, the General Counsel asserts that the Guild made its demand to bargain in a June 10, 2014 E-Mail. (Jt. Ex. 4; GC Br. at 5, 11-12). The cited June 10 E-Mail – including the text referenced by the General Counsel – states:

> As you can probably imagine, our members are quite concerned about parking ***after the move***, which is only three months away. Of course the Guild has the right to ***bargain the effects of the move***, which would include any change in parking arrangements or costs.

(Jt. Ex. 4) (emphasis added). The General Counsel's emphasis (GC Br. at 5) attempts to ignore the plain text of the Guild's letter by attempting to edit out the Guild's request to ***bargain the effects of the move*** out of the demand. The General Counsel further manipulates the evidence by then relying on the June 16 letter from Grieco (GC Ex. 29) claiming that "nowhere in the June 16 letter does Grieco even use the word 'effects'." (GC. Br. at 12). The General Counsel's arguments are unsupportable.

As an initial matter, Grieco wrote, in the June 16 E-Mail:

> Last week, I sent an e-mail invoking the Guild's right to bargain concerning the changes in parking arrangements or costs, and, to start, I requested information that would relate to such bargaining …

(GC Ex. 29). In explaining his June 16 correspondence, Grieco testified that he invoked the right to bargain in his June 10 E-Mail, to which he made a specific reference. (Tr. at 478; Jt. Ex. 4; GC Ex. 29). The June 10 E-Mail specifically sought to "bargain the effects of the move," specifically "parking after the move." (Jt. Ex. 4). The Guild only sought effects bargaining.

In addition to the specific language of the June 10 and June 16 communications, every additional communication concerning bargaining, and the type of bargaining, reflects that the Guild only sought to engage in effects bargaining:

- On June 27, in an E-Mail, Grieco wrote "In anticipation of our upcoming ***effects bargaining***, I will need answers to the following …" (Jt. Ex. 20).
- On June 30, Grieco wrote "Given the fact that ***the bargaining we requested on June 10*** will not begin until July 11, we request that the July 7 deadline be postponed …" (Jt. Ex. 22) (emphasis added).

In evaluating the Guild's only proposal on July 11, nothing in the proposal concerned the decision to sell the *Detroit News* building, including the parking lots, and move to 160 Fort Street. (Jt. Ex. 34). Instead, each of the six points contained in the proposal to modify the existing Collective Bargaining Agreement related to a purported effect of the new parking policy. (Jt. Ex. 34). Additionally, the General Counsel cites Jt. Ex. 35 as evidence the Guild sought to engage in decisional bargaining. (GC. Br. at 6). This assertion is incredible because, as the General Counsel acknowledges, Grieco ***only sent this communication to Guild membership*** after the June 11 meeting with *Free Press*. It is difficult to understand how *Free Press* can be on notice of the Guild's purported attempt to bargain over the decision to sell the *Detroit News* building, sell the

parking lots, and move to 160 Fort Street, when the only document that even mentions the word "decision," is a communication exclusively to the membership and after the July 11 meeting. (Jt. Ex. 35). Additionally, an examination of Jt. Ex. 35 demonstrates that the Guild knew, and admitted, that it only sought to bargain over the effects of the decision. The letter to the membership states, in relevant part:

> A change in past practice – and there is a long past practice of providing a parking benefit – is also a change in working conditions and is thus subject to bargaining, we believe. The Union also has the right to demand bargaining over the "effects" to the employees of a legitimate management decision, such as the decision to change the location of the office. This remains the Guild's position …

(Jt. Ex. 35). Thus, in the document cited by the General Counsel, the Guild ***admitted that the change of the location was a legitimate management decision over which the Guild, in its estimation, believed it had the right to bargain only over the effects of the move***.

Furthermore, the General Counsel cites Grieco's testimony as evidence that the Guild attempted to bargain over the decision to move to 160 Fort Street. (GC Br. at 6). In reality, the cited transcript testimony reads:

> Q. All righty. Joint Exhibit 4 is a letter -- I'm sorry.
> In the middle of it is a letter that you wrote to folks at the News. I'm sorry.
>
> A. And the Free Press.
>
> Q. And the Free Press. Okay. And I'm particularly interested in the second sentence of your e-mail which says, "Of course, the Guild has the right to bargain the effects of the move," right?
>
> A. Yes.
>
> Q. Okay. So you weren't bargaining the company's decision to actually move from its old facility to its new facility, correct?

A. No.

Q. Okay. That's a legitimate management activity, right?

A. I would think so, yes.

Q. Okay. It's not something about which the company has to bargain, right?

A. Not to my knowledge.

MS. KOCK: Objection. Calls for a legal conclusion.

JUDGE FLYNN: It's irrelevant anyway. Go ahead.

Q. BY MR. PLOSA: If I can turn your attention to Joint Exhibit 20. It's an e-mail from you to Mr. Lefebvre?

A. Yes.

Q. Copied to people. First sentence there, "In anticipation of our upcoming effects bargaining"?

A. Yes.

Q. That was your terminology, right?

A. Yes, it was.

Q. If I can turn your attention to Joint 22. Third sentence of your e-mail, "This will give us the opportunity to bargain the issues and perhaps resolve any issues that might affect the employees' decisions." That's what you wrote, correct?

A. I did.

Q. And the decisions of the employees are whether or not to park at the lots that the company had announced for the new facility, correct?

A. Or which one to pick or ---

Q. But it was the employees' decision about whether or not to park there, correct?

A. Yes.

(Tr. 628-629). In spite of the General Counsel's representation, Grieco consciously admitted that the Guild sought only to bargain over the ***effects*** of the decision to move to the new facility; the Guild ***never sought to bargain over the decision***.[3]

Finally, the General Counsel citation to Transcript Page 631 was Grieco's admission that he used the words "effects bargaining" in the July 14 E-Mail to membership. (GC Br. at 6; Tr. 631; Jt. Ex. 35). The transcript reads:

> Let's go to Joint 35, which is your e-mail to the unit members.
>
> A. Yes. I am there.
>
> Q. Okay, great. Now, fourth full paragraph at the bottom of the first page.
>
> A. Last paragraph on the page. Okay.
>
> Q. Third line from the bottom, "The Union also has the right to demand bargaining over the effects to the employees of a legitimate management decision." You wrote that, right?
>
> A. I did.
>
> Q. Now, going over some of these communications from you, you discussed it as effects bargaining, you describe it as effects bargaining?
>
> A. I did.
>
> Q. That was your decision to use that word, correct?
>
> A. Yes.

[3] The General Counsel's objection to questions involving decisional bargaining and the ALJ's statement that testimony regarding decisional bargaining was "irrelevant anyway (Tr. 628)," was an admission by the General Counsel that decisional bargaining was not at issue at the hearing. *See Bakersfield Californian*, 337 NLRB 296, 298 (2001) (General Counsel's failure to contest Respondent Attorney's contention that certain allegations were not at issue precluded the General Counsel from expanding the Complaint.)

(Tr. 630-631). No reasonable reading of the Transcript demonstrates that the Guild ever demanded or intended to demand bargaining over the effects of the decision to move to 160 Fort Street and sell the parking lots.

C. The Record Fails to Show that *Free Press* Refused to Bargain Over the Effects of the Decision to Move to 160 Fort Street.

The ALJ recognized that *Free Press* had the right to relocate. (ALJ Dec. at 16). The decision to relocate to 160 Fort Street was not subject to bargaining. The General Counsel appears not to recognize this tenet.

The General Counsel also mischaracterizes the July 11 meeting, claiming that no bargaining occurred because *Free Press* "refused to bargain about the decision to change the parking policy." (GC. Br. at 6, 11-13). It takes two to bargain. *Free Press* respectfully incorporates its arguments pertaining to bargaining contained in its Brief in Support of Exceptions and Reply Brief in Support of Exceptions. In addition, *Free Press* directs the Board to *Mack Trucks*, 277 NLRB 711, 711 (1985) as further argument that, pursuant to Section 8(d) of the Act – that explains the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession" – a party is privileged to reject a proposal that seeks to modify provisions of an existing collective bargaining agreement, and such a rejection does not amount to a refusal to bargain over the effects of a decision.

Finally, and tellingly, an evaluation of the Guild's single proposal, and any of its six points, fails to yield any proposal to bargain over the decision to relocate to 160 Fort Street. There are no facts upon which to base the General Counsel's Exceptions, in this regard; Exceptions related to a failure to bargain over the decision to relocate should be denied.

II. DIRECT DEALING ALLEGATIONS REGARDING THE JUNE 16 E-MAILS

As argued in its Exceptions, Brief in Support Thereof, and Reply Brief in Support of Exceptions, *Free Press* asserts that the June 16 E-Mail from Joyce Jenereaux (Jt. Ex. 6) did not constitute direct dealing.

Free Press acknowledges that Paragraph 11(a) in the Complaints references the June 16 E-Mail from Mark Brown. (GC Ex. 1(m) and 1(o); Jt. Ex. 7). For the same reasons as explained regarding Jenereaux's June 16 E-Mail (Jt. Ex. 6), Brown's June 16 E-Mail did not constitute direct dealing. Brown's E-Mail re-stated specific points in Jenereaux's E-Mail and, significantly, did not contain a sign-up sheet. Like Jenereaux's E-Mail, there was no solicitation. Brown's E-Mail went to the Union President, Union Treasurer, and Union representatives at the time of its sending. The Guild was not excluded from the communication. Additionally, both Jenereaux's and Brown's June 16 E-Mails postdated the Guild's June 10 demand to bargain. The June 16 E-Mails of both Jenereaux and Brown are lawful speech protected by Section 8(c) of the National Labor Relations Act and the First Amendment of the Constitution of the United States of America. Cross-Exceptions related to allegations of direct dealing should be dismissed.

III. THE REMEDY ADVANCED BY THE GENERAL COUNSEL IS IMPROPER AND SHOULD NOT ISSUE.

The General Counsel relied heavily on *Comar, Inc.*, 349 NLRB 342 (2007), a compliance specification hearing, as justification for a make-whole remedy and a *Transmarine* remedy. (GC Br. at 14-15). Omitted from the block quote from *Comar* was the statement that the remedy was limited to the law of that case. *See* 349 NLRB at 362. ("I conclude, moreover, that given the purposes of the *Transmarine* remedy, it is more appropriate ***in this instance*** to continue such relief during the back pay period than to

limit it to the 2-week minimum …") (Emphasis added). *Comar* involved a company unilaterally withdrawing recognition from a union, transferring bargaining-unit employees to a new plant where they performed essentially the same functions, paying bargaining-unit employees a wage lower than that they had currently enjoyed, refusing to bargain with the union over the effects of the move, refusing to recognize and bargain with the union upon its demand for recognition, and failing to comply with the Board order for two and a half years. In addition, with respect to the remedy, the ALJ made specific note of "the Respondent's recalcitrance." *Id.* at 362. These factual distinctions are significant, for the instant case. *Free Press* is not a "recalcitrant" employer, nor are any of the egregious unfair labor practices present in the instant case.

The General Counsel also fails to acknowledge that *Free Press* simply relocated and did not shut down the enterprise. Every bargaining-unit employee remained employed at *Free Press* after the move to 160 Fort Street. There were no layoffs and the company continued to operate. These facts distinguish the instant case from any precedent relied upon by the General Counsel. A make-whole remedy and *Transmarine* remedy would amount to a windfall inconsistent with the remedial purposes of the Act.

Further, in as much as *Free Press* had an obligation to bargain over the effects of the decision to relocate, the Guild failed to do so. The Guild made a single proposal to modify the existing Collective Bargaining Agreement. *Free Press* cannot be found to have "failed to bargain," when the Guild failed to make a legitimate demand to bargain over any effects. A make-whole remedy would serve to obtain for the Guild that which it was unable to achieve in its effort to modify the existing Collective Bargaining Agreement. The Board's unfair labor practice machinery cannot be used to advance an

unachieved bargaining goal. A make-whole remedy, in the instant case, is void as a matter of law because it would eradicate Section 8(d) of the Act by forcing *Free Press* to make a concession. The General Counsel's Cross-Exceptions threaten the integrity of the Act and should be denied.

CONCLUSION

WHEREFORE, for the reasons explained herein, and for any additional reasons deemed appropriate, DMP and *Free Press* respectfully request that the Cross-Exceptions of the General Counsel be denied.

DATED: November 24, 2015
Nashville, Tennessee

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that this **ANSWERING BRIEF TO THE CROSS-EXCEPTIONS OF THE GENERAL COUNSEL** in NLRB Case Nos. 7-CA-132726 and 7-CA-132729 was filed electronically with the Executive Secretary, and served via Federal Express, upon the following, this 24th day of November, 2015:

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